INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	6
Argument	11
Conclusion	15

CITATIONS

CASES:

Jay v. *Boyd*, No. 503, O. T. 1955, decided June 11, 1956 ..13, 14
Kaloudis, United States ex rel. v. *Shaughnessy*, 180 F. 2d 489 14
Mastrapasqua v. *Shaughnessy*, 180 F. 2d 999 14
United States v. *Menasche*, 348 U.S. 528 .....14, 15
Zacharias, United States ex rel. v. *Shaughnessy*, 221 F. 2d 578 14

STATUTES:

Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, 54 Stat. 671, 672, 8 U.S.C. (1940 ed.) 155(c), Section 19(c) 2

Immigration and Nationality Act of 1952, 66 Stat. 163:

Section 244(a)(5) (8 U.S.C. 1254(a)(5)) 4, 12

Section 405(a) (8 U.S.C. 1101, note) 5, 12

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 205

UNITED STATES OF AMERICA, EX REL. ANASTASIOS HINTOPOULOS AND ELIZABETH HINTOPOULOS, *Petitioners*

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (Pet. 29-40) are not yet reported. The opinion of the District Court for the Southern District of New York (Pet. 23-28) is reported at 133 F. Supp. 433.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1956 (Pet. 29). The petition for a writ of

certiorari was filed on June 27, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exercise of administrative discretion by the Board of Immigration Appeals, in denying petitioners' applications for suspension of deportation under the provisions of Section 19(c) of the Immigration Act of 1917, was improperly influenced by the provisions and legislative history of the Immigration and Nationality Act of 1952, which evidenced Congressional intent to curtail the granting of such suspensions but which provided in its saving clause that applications already pending should be considered under the 1917 Act.

STATUTES INVOLVED

Section 19(c) of the Immigration Act of 1917, 39 Stat. 889, as amended by the Act of June 28, 1940, 54 Stat. 671, 672, 8 U.S.C. (1940 ed.) 155(c), provided in pertinent part:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation, or (2) suspend deportation of such alien if not racially inadmissible or ineligible to naturalization in the United States if he finds that such deportation would result in serious economic detriment to a citizen or legally

resident alien who is the spouse, parent, or minor child of such deportable alien. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, all of the facts and pertinent provisions of law in the case shall be reported to the Congress within ten days after the beginning of its next regular session, with the reasons for such suspension. The Clerk of the House shall have such report printed as a public document. If during that session the two Houses pass a concurrent resolution stating in substance that the Congress does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien in the manner provided by law. If during that session the two Houses do not pass such a resolution, the Attorney General shall cancel deportation proceedings upon the termination of such session, except that such proceedings shall not be canceled in the case of any alien who was not legally admitted for permanent residence at the time of his last entry into the United States, unless such alien pays to the Commissioner of Immigration and Naturalization a fee of $18 (which fee shall be deposited in the Treasury of the United States as miscellaneous receipts). Upon the cancellation of such proceedings in any case in which such fee has been paid, the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the

Act of May 26, 1924 (U.S.C., title 8, sec. 212), for the fiscal year then current or next following.

Section 244(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 215, 8 U.S.C. 1254(a)(5), provides:

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hard-

ship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U.S.C. 1101, note, provides:

Sec. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which

is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.

STATEMENT

This is a habeas corpus proceeding to test the validity of an order of the Board of Immigration Appeals, which denied the petitioners' request for suspension of deportation under the provisions of Section 19(*c*) of the Immigration Act of 1917 (*supra*, pp. 2-4) The writ was dismissed by the District Court for the Southern District of New York (Pet. 23-28; R. 3-7), and the dismissal was affirmed on appeal (Pet. 29-37; R. 31), Judge Frank dissenting (Pet. 38-40; R. 31-34).

The following facts were found by a hearing officer of the Immigration and Naturalization Service at a hearing held on May 29, 1952:

Petitioners are husband and wife, both citizens of Greece, who entered this country legally as seamen in 1951, the wife in July and the husband in August, and overstayed their temporary admission as seamen. The wife testified at one point that she knew she was pregnant at the time of her admission and wished to remain here until her child was born. Later she stated that at the time of her entry she intended to be examined by a doctor ashore to determine if she could continue to travel in her pregnant state. (R. 9.) She conceded that she intended to abide by the doctor's advice as to the length of time she should remain in this country (R. 10). Her husband stated that he left his ship because of his wife's illness and intended

to remain here until she recovered (R. 9). On these uncontroverted facts, the hearing officer found petitioners deportable, as immigrants without visas, under Sections 13 and 14 of the Immigration Act of May 26, 1924 (R. 11-12).

On the basis of the fact that their child (born in this country in November 1951) was a citizen of the United States, and that their deportation would result in serious economic detriment to him, petitioners, at the time of the deportation hearing, applied for suspension of deportation under the provisions of Section 19(c) of the Immigration Act of 1917 (*supra*, pp. 2-4) (R. 10). In denying suspension, the hearing officer stated (R. 10-11):

> Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64 a week. Their joint assets consist of savings in the sum of about $500 and their furniture and other personal property which they value at $1500. While it would seem that their son, who was born in New York City in November, 1951 would suffer economically if his

parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the accident of birth in the United States of their son would be to deprive others, who are patiently awaiting visas under their already oversubscribed quotas. It is noted also that neither respondent reported his and her presence in the United States at any time until January, 1952 when they filed applications for suspension of deportation just two months after the birth of their child. However, since they meet the statutory requirements for the alternative application they have made and since they have indicated that they would be willing and are able to leave this country within the period of approximately thirty days, their applications for voluntary departure in lieu of deportation will be granted. * * *

The denial of suspension of deportation was appealed to the Board of Immigration Appeals. In its order of March 18, 1954, denying suspension and dismissing the appeal, the Board stated in part (R. 16):

> As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other

dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.

Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion.[1] We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

---

[1] *Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489.

On May 5, 1954, the Board denied petitioners' motion for reconsideration (R. 17-19) and stated (R. 18-19):

* * * On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that

> Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.
>
> * * *
>
> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Taken into custody on warrants of deportation, petitioners sued out writs of habeas corpus alleging that the Attorney General had abused his discretion in denying their applications for suspension of deportation (R. 3-4). The District Court held that it had no power to overturn the exercise of discretion by the Board of Immigration Appeals, acting for the Attorney General, since the Board had neither abused its discretion nor acted capriciously (Pet. 28; R. 7). The District Court stated that, in exercising its discretion under the Immigraton Act of 1917, the Board could properly take into account the new and stricter standards relative to suspension of deportation which Congress laid down in the Immigration and Nationality Act of 1952 (Pet. 27; R. 6-7).

In affirming the dismissal of the writ by the District Court, the Court of Appeals held that the reference to the 1952 Act in the second opinion of the Board of Immigration Appeals (*supra,* pp. 9-10) did not mean that the Board felt that the scope of its discretionary power was restricted by that Act, but rather that its exercise of discretionary power was consonant with the policy of the Act (Pet. 37; R. 31).

ARGUMENT

Although petitioners' contentions here are couched in terms of insufficient evidence to support the denial of suspension and the resulting denial of due process (Pet. 11-21), it is evident that their real complaint is against the Board's reference, in its opinion denying reconsideration, to the requirements for suspension set forth in the 1952 Act and the apparent influence of those new requirements upon the Board's thinking in exercising its discretion to deny suspension. There was no conflict in the evidence before the Board and it is not contended that the Board did not consider all the facts. Nor is there any dispute concerning petitioners' right to have their applications for suspension considered and determined under the eligibility standards of the 1917 Act. The Board recognized that right and specifically held that petitioners were eligible for suspension under that Act. (*Supra,* pp. 8-10; Pet. App. A, 26; Pet. App. B, 31).

The Board's first decision of March 18, 1954, set forth the factors and merits of the petitioners' cases upon which it rested its exercise of discretion: both were aliens illegally residing in this country who had

entered as seamen and had been here only a short time; they had no other dependents or close family ties here; and the husband might be able to obtain work as a Greek seaman and earn $85 monthly (R. 16). The hearing officer had added that to allow petitioners to stay would deprive others of visas under already oversubscribed quotas (R. 10-11). These discussions by the agencies charged with responsibility for deciding petitioners' applications, and the Board's statement that "the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case" (R. 16), demonstrate that the decisions denying suspension were in truth an exercise of the discretionary authority granted by the 1917 Act, without reference to the new requirements for eligibility for suspension established by the intervening 1952 Act.

The Board's mention, in its later opinion denying reconsideration, of the purpose of Congress in the 1952 Act to "restrict the granting of suspension" (R. 18; *supra*, p. 10) does not indicate, as petitioners and the dissenting judge below (Pet. 38-40) contend, that the Board, contrary to the savings clause (§ 405(a)) of the 1952 Act, decided petitioners' applications on the basis of the new standards for eligibility prescribed by Section 244(a) of that Act. The Board did *not* say that it was bound by the new Act. At most, the reference indicates that Section 244(a) was a factor which the Board considered in exercising its discretion under the standards of the 1917 Act, once it had decided, as it clearly did, that petitioners were statutorily eligible for suspension under the 1917 Act.

There was no impropriety, much less illegality, in taking this factor into account in the course of exercising discretion whether or not to suspend. This Court recently pointed out in *Jay* v. *Boyd*, No. 503, O.T. 1955, decided June 11, 1956, after the decision below (slip opinion, pp. 7-9):

> * * * However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of the Attorney General. The statute says that, as to qualified deportable aliens, the Attorney General "may, in his discretion" suspend deportation. *It does not restrict the considerations which may be relied upon* or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace," *Escoe* v. *Zerbst*, 295 U.S. 490, 492, and "cannot be demanded as a right," *Berman* v. *United States*, 302 U.S. 211, 213. And this unfettered discretion of the Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole. [Emphasis added.][1]

[1] Although the *Jay* case involved suspension of deportation under the 1952 Act, the grant of discretionary power under the 1917 Act was substantially the same (see fn. 15 of the *Jay* slip opinion, pp. 7-8).

granted. In reaching this conclusion, he considered the brevity of their period of residence here and the absence of relatives here other than their infant son. However, he concluded that they should be permitted to depart voluntarily rather than being subjected to deportation (R. 9).

On appeal, the Board of Immigration Appeals agreed with the hearing officer. On the basis of the entire record, the Board held that suspension of deportation was not warranted even though petitioners had brought themselves within the class of persons as to whom there was authority to grant that relief. The Board said (R. 13–14):

> * * * the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion [citing *Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2) and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2)]. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. * * *

Thereafter, the petitioners filed with the Board of Immigration Appeals a motion for reconsideration on the ground that suspension was appropriate in order to protect the interests of the infant son who was an American citizen. The Board denied this motion, stating (R. 15–16):

> * * * * *
>
> Counsel's motion sets forth no matters of which we were unaware at the time our previ-

The analogy the majority of the court below drew between the Board's consideration of the policy of the 1952 Act in exercising its discretion and the propriety of a "wise judge's" consideration of "contemporary *mores* and public opinion" in refusing probation and imposing a prison sentence (Pet. 36-37) is particularly apt in view of the *Jay* decision which also likened suspension of deportation to "probation or suspension of criminal sentence", each being "an act of grace". Like the court below in this case, this Court cited Judge Learned Hand's opinion in *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491, in explaining that, like a judge's discretion to grant or refuse probation, the Attorney General's discretionary authority with respect to suspension of deportation is "unfettered" (*Jay* slip opinion, fn. 16, p. 8). We think the *Jay* decision confirms the holding below that the Board could properly consider the policy of the 1952 Act in the exercise of its discretionary authority under the 1917 Act.

Finally, the *Jay* ruling—the latest holding in this area—renders unavailing petitioners' claim (Pet. 11) that the decision below is in conflict with earlier decisions of the Second Circuit and with *United States* v. *Menasche*, 348 U.S. 528. In any event, there is no conflict. In *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999 (C.A. 2), the Board did not exercise its discretion at all, but denied suspension because the alien was one of a class of aliens whom the Attorney General had earlier said should be denied discretionary relief. *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578 (C.A. 2), involved a situation where the Board

> ous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244 (a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19 (c) of the Immigration Act of 1917, as amended.
>
> * * * * *
>
> Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

Taken into custody on warrants of deportation, petitioners sued out writs of habeas corpus alleging that there had been an abuse of discretion in the denial of their applications for suspension of deportation (R. 2–4). The district court upheld the order of the Board of Immigration Appeals, finding that it had neither abused its discretion nor acted capriciously in denying petitioners' application for suspension of deportation (R. 2–6). The district court noted that, in exercising discretion under the Immigration Act of 1917, the Board could properly take into account the subsequently enacted Immigration and Nationality Act of 1952 (R. 4–6).

applied the *eligibility* standards of the 1952 Act, although the savings clause of that Act called for application of the eligibility standards of the prior law. Nor is there any inconsistency with *Menasche*, for the Board expressly adjudged petitioners' applications for suspension under the eligibility standards prescribed by the 1917 Act (*supra*, pp. 9-10, 11).

CONCLUSION

We submit that the intervening *Jay* decision of this Court is dispositive of the issue in this case, and also that the holding below is correct and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

OSCAR H. DAVIS,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

ROBERT S. ERDAHL,
ISABELLE CAPPELLO,
Attorneys.

JULY 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956—393156/P.O. 77